

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-537**

IN THE MATTER OF
LARRY L. (ANONYMOUS),

Petitioner,

vs.

VERONICA P. (ANONYMOUS),

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK**

HARRY G. DAVIDSON
Attorney for Petitioner
249 Huguenot Street
New Rochelle, New York 10802

McGOVERN, CONNELLY & DAVIDSON
Of Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

In the Matter of

LARRY L. (ANONYMOUS),

Petitioner,

- against -

VERONICA P. (ANONYMOUS),

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the captioned case in the matter of Veronica P. (Anonymous) v. Larry L. (Anonymous) on the 16th day of June, 1977 which reversed a decision to the Appellate Division of the Supreme Court and reinstated the original decision of the Trial Court determining filiation in the petitioner herein.

CITATIONS TO THE OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at _____ N.Y.2d

_____, N.E.2d _____, and _____,
N.Y.S. 2d _____ (Appendix A).

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department is reported at 51 A.D. 2d 574, 378 N.Y.S. 2d 481. (Appendix B).

The opinion of the Family Court, Westchester County, New York is unreported. (Appendix C).

JURISDICTION

The determination of the Court of Appeals of the State of New York entered June 16, 1977 reinstating the determination of filiation made by the Trial Court is a determination by the highest State Court in which a decision could be had. The jurisdiction is invoked under 28 U.S.C. 1257(3), the petitioner claiming rights, privileges and immunities under the Fifth and Fourteenth Amendments to the Constitution of the United States.

ISSUE PRESENTED

Whether the petitioner has been accorded due process when a finding of filiation has been made at a proceeding held at a time when the petitioner was not present and whether the Trial Court lost jurisdiction to enter an order as a result of a two and one-half year delay between the rendering of a decision and the entry of an order thereon.

STATUTORY PROVISIONS INVOLVED

None.

CONSTITUTIONAL PROVISIONS

AMENDMENT V

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On November 9, 1965 the respondent herein filed a paternity petition with the Family Court of Westchester County alleging the petitioner herein to be the father of her child. Various proceedings were held and eventually a trial date set for February 21, 1967. Upon that date the petitioner herein did not appear for trial. A decision was made and filed on March 7, 1967 which required the submission of an order on five days notice.

Some two and one-half years later the Trial Court, sua sponte, made and entered an order dated November 21, 1969 based upon the decision dated March 7, 1967.

On June 16, 1975 the petitioner herein appeared by his attorney in the Family Court and there was then determined to be for the first time a deficiency owing by the petitioner as a result of the order dated November 21, 1969. A notice of appeal was filed in behalf of petitioner appealing the provisions of the order dated June 16, 1975 and November 21, 1969. An order to show cause was obtained seeking stay of enforcement of the proceedings on August 5, 1975 and a further order entered

by the Appellate Division of the Supreme Court, Second Department staying all proceedings on August 20, 1975.

An appeal was prosecuted in the Appellate Division, Second Department which resulted in an opinion dated January 26, 1976 (Appendix B) which reversed the appealed from orders of the Family Court and ordered the matter returned to the Family Court for a de novo hearing as to the issue of paternity and support. Thereafter an appeal was taken from this order by the means of filing a Stipulation for Judgment Absolute with the Court of Appeals of the State of New York by the respondent herein. The matter was argued before the Court of Appeals of the State of New York and a decision rendered dated June 16, 1977 reinstating the determination of filiation by the Trial Court and remanding the matter to the Family Court for consideration as to the question of arrearage and amount of current payments to be made (Appendix C). No further proceedings have been had to date in the Family Court. In both the Appellate Division of the Supreme Court, Second Department and the Court of Appeals the petitioner herein set forth arguments of deprivation of due process.

REASONS FOR GRANTING THE WRIT

In this case the Court of Appeals through its decision, in disagreement with the intermediate appellate court, has sanctioned a total disregard and departure from the requirement of due process imposed by the

Fifth and Fourteenth Amendments to the Constitution of the United States. Such constitutes a departure from the accepted and usual course of judicial proceedings.

The degree of the departure from due process can best be illustrated by a chronological resume of the proceedings of this case. They are as follows:

September 9, 1965 - An infant, Debra Ann Pileggi is born to the respondent.

November 9, 1965 - The respondent files a paternity petition with the Family Court of Westchester County alleging the petitioner to be the father of her child.

November 26, 1965 - The petitioner appears pursuant to a summons and requests an opportunity to be represented by counsel.

December 10, 1965 - Petitioner appears with counsel and makes request for blood grouping tests.

January 28, 1966 - Blood grouping test is received by the Court and does not exclude the petitioner from paternity.

March 7, 1966 - Matter adjourned by consent of counsel.

March 22, 1966 - Matter adjourned by consent of counsel.

April 29, 1966 - Matter adjourned by consent of counsel.

May 2, 1966 - Demand for verified bill of particulars served by attorney for petitioner.

May 13, 1966 - Respondent's bill of particulars filed.

January 6, 1967 - Counsel for petitioner appears in Court without his client and the matter is adjourned for trial to February 21, 1967.

February 14, 1967 - Petitioner informs his attorneys by letter of the fact that his employment requires his departure from the United States by merchant ship and his unavailability for 45 to 60 days.

February 14, 1967 - Petitioner departs by merchant ship S S Sapphire Etta from Bayonne, New Jersey bound for Europe.

February 21, 1967 - James O'Donnell, attorney for the petitioner appears before the Family Court and requests an adjournment of the hearing and produces for the Court a copy of petitioner's letter of February 14, 1967. The request for adjournment of petitioner's counsel is denied and the matter is referred immediately for trial to the Hon. William A. Walsh. A trial of the issues is held before Judge Walsh. The respondent gives testimony and is cross examined. No witnesses are presented in behalf of the petitioner. The decision is reserved.

March 7, 1967 - The decision of Judge Walsh determining the petitioner to be the father of the child of the respondent is filed.

The decision states at the conclusion thereof "submit order on five (5) days notice."

November 21, 1969 - An order is signed in this proceeding by Judge Walsh, apparently sua sponte, determining the petitioner to be the father of the child of the respondent.

December 2, 1969 - Petitioner and counsel appear pursuant to notice before the Family Court and are informed of the signing of the order dated November 21, 1969. Counsel moves to vacate the order and for a dismissal of the petition. Proceedings are adjourned to January 19, 1970 in order to afford the County Attorney time to respond to the motion.

December 24, 1969 - A copy of the order of Judge Walsh dated November 21, 1969 is served by mail by the office of the County Attorney upon the attorneys for the petitioner without notice of entry.

December 31, 1969 - The copy of the order without notice of entry is received by the attorney for the petitioner.

January 2, 1970 - Petitioner's attorney writes a letter to Judge Walsh concerning the pending motion and requesting a copy of the decision on the motion.

January 19, 1970 - No opposition papers are received from the County Attorney nor are there any appearances before the Court. Nevertheless, respondent-appellant's brief claims that the County Attorney's responsive papers with proof of service were

"apparently" filed with the Court on this date. No decision was ever received or probably ever made on this motion.

June 16, 1975 - Pursuant to notice, Robert J. McGoey new attorney for the petitioner appears before the Hon. Vincent Gurahian in behalf of the petitioner. Judge Gurahian informs the attorney for the petitioner that in fact an order has been previously entered determining the petitioner to be the father of the child during the year 1969. Judge Gurahian makes an order on this date confirming the prior order of Judge Walsh and ordering a computation by the accounts division of the Department of Probation of arrears owed by the petitioner.

June 26, 1975 - Petitioner receives a computation pursuant to the order of Judge Gurahian from the County of Westchester, Department of Probation ordering him to pay arrears from March 7, 1967 to June 26, 1975 of a total sum in excess of \$4,000.00.

August 1, 1975 - A notice of appeal is filed in behalf of the petitioner as concerns the orders of November 21, 1969 and June 16, 1975.

August 5, 1975 - An order to show cause is signed by the Hon. Arthur D. Brennan, Associated Justice of the Appellate Division, Second Judicial Department requiring the respondent to show cause why a stay of enforcement proceedings should not be granted.

The petitioner herein was not accorded the right to be present at the hearing the purpose of which was to determine paternity. The determination in the Trial Court of paternity was made at a hearing where only the testimony of the respondent was heard. An attorney was present who had been retained by the petitioner but who was not authorized to conduct a trial without the presence of the petitioner. The denial of the petitioner's application for an adjournment of no more than 60 days until he could return to the continental United States was improperly made.

Not only was there a failure due process upon the original hearing but subsequent to the hearing no order was made on the decision for a period of two and one-half years and in fact no demand made upon the petitioner for payments pursuant to that order for a period of ten years. The proper remedy as set forth by the intermediate appellate court was for a hearing de novo on the question of paternity which would allow the petitioner herein to have his day in court and thereby the due process to which he is entitled under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The initial refusal of the Trial Court to grant a reasonable adjournment for the purposes of permitting the petitioner to be present at trial, the delay of two and one-half years from the rendering of a decision to the entry of an order thereon, the further delay of ten years in enforcement of the provision of the order and the approval of each of these procedures by the Court of

Appeals of the State of New York constitutes a gross departure from the accepted and usual course of judicial proceedings, violates the petitioner's rights under the Fifth and Fourteenth Amendments and requires the exercise of this court's power of supervision in order to correct the injustice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari be granted.

Harry G. Davidson Esq.
Attorney for Petitioner,
Larry L. (Anonymous)

McGovern, Connelly & Davidson
Of Counsel

SEPTEMBER 1977

APPENDIX A
OPINION OF THE NEW YORK STATE
COURT OF APPEALS

MEMORANDUM:

The order appealed from should be modified, without costs, and the case remitted to Family Court, Westchester County, for further proceedings. Respondent perfected a timely appeal from the 1975 order modifying a previous filiation order entered in 1969. This order of modification created a new right to appeal, and brings before the court the entire order, including those issues that would have been raised on an appeal from the 1969 order alone. (See Cohen and Karger, Powers of the New York Court of Appeals, §104, at pp 436-437). We do not believe that the Family Court lost jurisdiction to enter the original order of filiation due to the lapse of two and one-half years between the rendering of a decision and the initial entry of an order. In our opinion the court retained continuing jurisdiction to make "an appropriate and suitable order or judgment which manifests the existence of a determination." (See Merrick v. Merrick, 266 NY 120, 122.) Of course, the appellant's delay in submitting a proposed order may represent an abandonment of the action. The appellant's overall delay in seeking enforcement of the 1967 decision may also warrant application of the doctrine of laches. On remand, therefore, the Family Court should consider whether, on the present facts, recovery of prior support payments should have been barred under a theory of either abandon-

ment or laches. The court may also reconsider whether a reasonable level for support payments was set and whether the amount of arrears was correctly determined.

Order modified, without costs, and the matter remitted to the Family Court, Westchester County, for further proceedings in accordance with the memorandum herein and, as so modified, affirmed. All concur.

APPENDIX B
OPINION OF THE SUPREME COURT
APPELLATE DIVISION, SECOND DEPARTMENT

In a paternity proceeding, the respondent putative father appeals from two orders of the Family Court, Westchester County, the first of which, dated November 21, 1969, inter alia adjudged him to be the father of a certain child and ordered him to pay \$7.50 per week towards the support of the child, and the second of which, dated June 16, 1975, inter alia directed the Accounts Division of the Department of Probation to compute arrears.

Orders reversed, on the law, without costs, and proceeding remanded to the Family Court for a de novo hearing and determination as to the issues of paternity and support. No fact issues were raised on this appeal.

In our opinion the Family Court lost jurisdiction to enter the order of filiation by reason of the lapse of two and one-half years between the time of the decision on the petition and entry of the order of filiation.

MARGETT, CHRIST and SHAPIRO, JJ., concur.

HOPKINS, Acting P.J., and MARTUSCELLO, J., concur as to the remand, but would do so solely for a new fixation of child support arrears, and otherwise dissent and vote to affirm the order of filiation, with the following memorandum:

No loss of jurisdiction ensued from the lapse of time between the decision and the

formal entry of the order of filiation. As to the amount of child support arrears, it appears to us that part thereof may have been waived by petitioner's laches.

APPENDIX C
OPINION OF THE FAMILY COURT
WESTCHESTER COUNTY

VINCENT GURAHIAN, Judge.

The above entitled matter having duly come before this Court on June 16, 1975 for a review, and the respondent's attorney, Mr. McGoey having appeared, and the Court having been advised that the respondent has never made a payment, and after due deliberation having been had, it is hereby

ORDERED, that the order heretofore entered be and hereby is modified to the extent that the respondent shall pay the sum of SEVEN DOLLARS AND FIFTY CENTS (\$7.50) per week for support plus the sum of TWO DOLLARS AND FIFTY CENTS (\$2.50) per week toward confinement expenses established at TWO HUNDRED AND SIX DOLLARS AND FIFTY CENTS (\$206.50), payable through the Accounts Division of the Department of Probation, 111 Grove Street, White Plains, New York, the DEPARTMENT OF SOCIAL SERVICES beneficiary, effective retroactively to March 7, 1967, and it is further

ORDERED, that the Accounts Division of the Department of Probation shall compute arrears, and it is further

ORDERED, that the respondent shall advise the Court and the Department of Probation of his residence or any change thereof should he move from the last address known. The respondent's failure to do so shall subject

him to the provisions of Section 454 of the Family Court Act.

APPENDIX D
AFFIDAVIT OF THE PETITIONER
IN SUPPORT OF APPLICATION FOR
ORDER TO SHOW CAUSE

STATE OF NEW YORK)
):s:
COUNTY OF WESTCHESTER)

LAWRENCE LEAHEY, being duly sworn, deposes and says:

That I am the respondent in the above captioned action and make this affidavit in support of the within application to the Appellate Division, Second Department for a stay pending an appeal of certain orders made by Justices of the Family Court of the County of Westchester.

This action was commenced by the filing of a petition sworn to November 9, 1965. The petition alleged that I was the father of a certain child born September 6, 1965. The petition was filed with the Family Court of Westchester County and thereafter a summons was issued. Pursuant to this summons, I appeared in the Family Court of Westchester County on October 26, 1975 and at that time requested an opportunity to be represented by counsel.

Thereafter I retained the law firm of O'Donnell & Condon of Yonkers, New York to represent me. I appeared with my counsel during the month of December, 1965 and entered a denial of the allegations of the petition.

Thereafter the matter was adjourned, I am informed by my attorney, numerous times until on January 6, 1967 a date was established for hearing to determine the issue of paternity. I was not present on this date but was represented at that time by counsel. My counsel then wrote to me informing me that it would be necessary for me to be in court on February 21, 1967. Upon receipt of this letter I in turn wrote a letter to my counsel informing them that my appearance would not be possible on that date because of my employment. At this time I was employed as a seaman and had been ordered by the company for which I worked to set sail aboard the S S Sapphire Etta which sailed from Bayonne, New Jersey on February 14, 1967 for Europe. On the date of the hearing of this matter I was actually aboard this vessel in the mid Atlantic Ocean and for this reason unable to appear for this hearing. In addition, I was never informed by my counsel that a hearing would, in fact, take place on that day nor was I informed that an application for adjournment would not be entertained by the court.

Annexed hereto as exhibit "A" is the copy of the letter written by me and received by my counsel informing my counsel of my inability to be present in court on February 21, 1967.

My counsel has consulted the records of the Family Court of Westchester County which reveals that on February 21, 1975 my counsel James O'Donnell appeared before the Court in my behalf, produced for the Court my letter dated February 14, 1967 and requested an adjournment of the hearing. In spite of the

numerous delays had prior to this time, the request for adjournment was not granted and Mr. O'Donnell was directed to proceed to hearing at that time without the benefit of my presence. The Family Court records further reflect that testimony was taken on that date of the petitioner alone and that no further witnesses were offered. The petitioner was cross examined by my counsel, but the minutes taken by the presiding justice reflected no information which was elicited upon cross examination. At the conclusion of the hearing, Judge William A. Walsh reserved decision.

Subsequent to February 21, 1967, I never received notification from any source whatsoever, except as will be set forth hereinafter, of the outcome or even the fact of the occurrence of this hearing. My counsel has informed me that Judge William A. Walsh filed a decision dated March 7, 1967, a copy of which is annexed hereto as Exhibit "B" finding that I was the father of the child. The court will note from a copy of this decision that Judge Walsh required that an order be submitted to him on five days notice. After the rendering of this decision neither the County Attorney of the County of Westchester who represented the petitioner nor my counsel submitted an order upon notice pursuant to Judge Walsh's decision. Instead, apparently sua sponte, Judge Walsh did make an order on November 21, 1969 based upon this decision. A copy of this order is annexed hereto as Exhibit "C". This order was not submitted by either of the attorneys upon notice to the other, and was, therefore,

not in conformity with Judge Walsh's decision rendered almost two years prior to the execution of this order.

After Judge Walsh executed this order, at no time did my counsel receive notice of entry of the order. This is true to the date of the giving of this affidavit. Thereafter the case reappeared on the calendar of the Family Court on December 2, 1969. At that time my counsel appeared and moved the Court to vacate the order made by Judge Walsh on November 21, 1969 on the grounds that it was not in conformity with the decision which had been made almost two years prior to that time. The matter was adjourned at that time to January 19, 1970 in order to afford the County Attorney of the County of Westchester the opportunity to file a reply affidavit in answer to the motion by my counsel to vacate the order. No reply affidavit was ever rendered upon this motion and no further proceedings in this matter took place until June 16, 1975.

Prior to June 16, 1975 I received a notice to appear in the Family Court of Westchester County on that date. Upon receipt of this notice, I consulted with my counsel Robert J. McGoey who agreed to appear for me on that date as I was scheduled to be employed at that hour as a police officer with the Town of Harrison and was not able to actually appear in Court.

I informed my attorney prior to his appearance that to the best of my knowledge there were no orders outstanding as there had never

been a trial in this matter. I told him that the Court had never made a determination as to the paternity of the child and that I expected that we would have to prepare for a hearing. No orders had ever been served upon me nor any demands made for payment pursuant to any such orders. To the best of my knowledge the matter was still pending before the court, and it was therefore necessary for me to obtain services of an attorney to represent me.

My attorney did appear on June 16, 1975 and was informed by the Court that there had been a prior order of the court. On this date Judge Gurahian made an order, a copy of which is annexed hereto as Exhibit "D". Thereafter I received a letter dated June 26, 1975 a copy of which is annexed hereto as exhibit "E" from the director of the Department of Probation of the County of Westchester. This order together with this letter would appear to direct me to pay a sum in excess of \$4,000 pursuant to a determination that I am the father of the child of the petitioner. I have been contacted by the Department of Probation and have been informed that they are prepared to take action to garnishee my salary which is paid by the Town of Harrison. I am a police officer there and could well be subject to discharge because of the basis for the garnishee which is proposed by the Department of Probation.

Upon receipt of the order of Judge Gurahian, I contacted my attorney immediately and have instructed him to take all appropriate action

necessary to protect me from the order of this court requiring payment as well as any action by the Department of Social Services or the Department of Probation which might be directed to my employment. Accordingly, my attorney has prepared and filed the annexed notice of appeal seen here as Exhibit "F" and it is my intention to take all action necessary to prosecute this appeal in order that I may have my day in Court.

I am requesting a stay of enforcement proceedings by this court for the following equitable reasons:

a) This action was commenced almost ten years ago and it was not until June of 1975 that any demand was made upon me for payment. This incredible delay militates against a finding by this court that the petitioner or the County of Westchester will be substantially prejudiced by a relatively brief delay for appeal.

b) I was never afforded the opportunity to litigate the question of paternity. I never received my day in court and the finding of paternity was based solely upon evidence offered by the petitioner without any reasonable opportunity on my part to question that evidence or to present evidence in my behalf.

c) The fact that the court which conducted the hearing refused to permit a reasonable adjournment which would have given me the opportunity to appear when such appearance

was obviously impossible on the dates set for hearing, the conduct of a hearing where only the petitioner's evidence was heard and no meaningful opportunity for cross examination or the presentation of contradictory evidence was possible, the entry of an order which was supposed to be upon five days notice pursuant to a decision almost two years after the decision and not upon notice but apparently at the instance of the court itself, the failure to serve a copy of this order with notice of entry upon my counsel, the failure of the Family Court to render a decision upon my counsel's motion to vacate this order when no opposition was offered to the motion by the attorney for the petitioner, and the transpiration of a period of ten years from the commencement of this action to the making of the order by Judge Gurahian on June 16, 1975 have all served to my prejudice in presenting a defense to these charges of paternity which are not true. I shall now be compelled, ten years after the fact to bring an appeal before this Court in order that I may have my day in court and present evidence contrary to the allegations of the petition.

The County of Westchester has taken no action based on these allegations and the subsequent findings for a period of almost ten years and now seeks to compel the retroactive payment by me of a very large sum of money which I am not able to pay. Upon my failure to pay this sum a garnishee will be filed with the Town of Harrison which action can very well result in my loss of employment.

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For the foregoing reasons, I respectfully request that this court grant an order to show cause together with a stay of all proceedings in the Family Court or by the Department of Probation of the County of Westchester, and for such other and further relief as to this Court may seem just and proper.

Dated: August 4th, 1975

s/Lawrence Leahey
LAWRENCE LEAHEY

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APPENDIX E
EXHIBIT A ANNEXED TO AFFIDAVIT
OF THE PETITIONER

20 East Clinton Avenue
Irvington, New York
February 14, 1967

O'Donnell and Condon
205 New Main Street
Yonkers, New York

Dear Mr. Condon:

I regret my inability to convey advance notice to you concerning my departure from Bayone Naval Base, Bayone, New Jersey as of nine o'clock P.M. this fourteenth of February. However, due to unavoidable circumstances, I am shipping out aboard the S.S. Sapphire Etta en route to the northern countries of Europe; my absence estimated as being an approximate forty-five to sixty days in length. This unfortunately constitutes all relevant information supplied to me through the union and company.

If, in any event, you feel contact with me becomes imperative then a telegram to me, Z no. 1235974, Engine Dept., in care of my ship will, I hope, suffice.

Promising immediate correspondence with you upon my return.

Yours very truly,

s/Larry Leahey